United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7407

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 75-7407

LUDDIE FORT

JAMES BOOKWALTER

Plaintiffs/Appellants

VS.

ROBERT C. WHITE D/B/A

ROBERT C. WHITE CO., REALTORS

Defendant/Appellee

APPELLANT'S BRIEF

Submitted by:

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STATEMENT OF ISSUES PRESENTED

1. Whether upon the finding that the Plaintiffs were the victims of racially discriminatory renting practices, the Court erred in awarding nominal damages of $1.00 to each Plaintiff and in not awarding punitive damages and/or attorney's fees?

STATEMENT OF THE CASE

This was an action for injunctive and monetary relief brought under Title VIII of the Civil Rights Act of 1968 and under the provisions of the Civil Rights Act of 1871, now codified as 42 U.S.C. §1982. Jones v. Mayer 392 U.S.409. The injunctive aspects of this suit were withdrawn from the case, with the approval of the Court, by the plaintiffs when the defendant entered into a consent decree with the plaintiffs in this case and with the United States of America in a companion case, United States of America v. R.C. White, Civil Action No. H74-392 (District of Connecticut).

The plaintiffs were seeking damages for an act of discrimination practiced upon them by the employees of the defendant. The plaintiff Luddie Fort, a black woman, sought to be shown an apartment on April 30, 1974 in 166-176 Collins Street in the City of Hartford. She was not shown an apartment. The plaintiff James Bookwalter is a white male and a resident of 166 Collins Street. He had standing to complain of discriminatory acts in the rental of apartments in the building in which he resided. Traficante v. Metropolitan Life Insurance Company 409 U.S. 205. The defendant is a property manager who, on behalf of apartment owners, manages apartment units in the greater Hartford area.

To show that the act of discrimination experienced by the plaintiff Luddie Fort was not an isolated, accidental or peculiar event constituting a single act of discrimination but was, instead, part of a pattern and practice (United States v. Gilman 341 F.Supp. 891, D.C.N.Y.), the plaintiff Luddie Fort and others organized a test of certain properties managed by the defendant. They also tested the office of the defendant. Through the use of testers, the following information was obtained:

R.C. WHITE TEST CHART

166 & 176 Collins Street

	Date	Approximate Time	Names and Race	Result
1.	4/30	11:00 a.m.	Luddie Fort Evelyn Nichols (Black)	Not Shown
2.	5/1	12:00 p.m.	Donna Fatsi Carol Anastasio	Shown
3.	5/1	2:00 p.m.	Cheryl Jordan Mary Soares (Black)	Not Shown
4.	5/3	10:45 a.m.	Wendy Hinds Gale Smith (Caucasian)	Shown
5.	5/3	2:00 p.m.	Adrienne Dukes Chester Smith (Black)	Not Shown
6.	5/3	3:30 p.m.	Boyd Hinds Astrida Olds (Caucasian)	Shown

73 & 79 Myrtle St. and 98 Garden St.

	Date	Approximate Time	Names and Race	Result
1.	5/20	10:20 a.m.	Boyd Hinds Wendy Hinds (Caucasian)	Shown
2.	5/20	11:45 a.m.	Michael Borders Luddie Fort (Black)	Not Shown
3.	5/20	2:15 p.m.	Boyd Hinds Thelma Caruso (Caucasian)	Shown

7 Woodland Street

	Date	Approximate Time	Names and Race	Result
1.	5/22	10:25 a.m.	Wendy Hinds Susan Getman (Caucasian)	Shown and made available
2.	5/23	12:00 p.m.	Kathleen Malcolm Chester Smith (Black)	Shown and made unavailable

R.C. White Office

	Date	Approximate Time	Names and Race	Result
1.	5/20	11:30 a.m.	Donna Fatsi Joseph Zanghi (Caucasian)	Told apartments available at 166 & 176 Collins St., 73 & 79 Myrtle St., 98 Garden St. and 7 Woodland St.
2.	5/20	1:35 p.m.	Cheryl Jordan Chester Smith (Black)	Not told apartments available at 166 & 176 Collins St., 73 & 79 Myrtle St., 98 Garden St. and 7 Woodland St.
3.	5/23	9:45 a.m.	Wendy Hinds Mary Bracket (Caucasian)	Told vacancy at 7 Woodland St.
4.	5/23	1:00 p.m.	Kathleen Malcolm Chester Smith	Told "hold" on vacancy at 7 Woodland St.
5.	5/23	2:00 p.m.	Wendy Hinds Astrida Olds (Caucasian)	Told vacancy at 7 Woodland St.

Testimony offered on behalf of the defendant indicated that at the start of the testing procedure the racial composition of the "tested" buildings were:

Apartment Address	No. of total Units	No. occupied by non-whites	Percentage of non-whites	No. occupied by blacks	Percentage of blacks
166 Collins St.	42	4	9.52%	2	4.76%
176 Collins St.	13	0	0	0	0
1/ 69, 73 & 79 Myrtle Street, 98 Garden Street	113	0	0	0	0
7 Woodland St.	40	4	10%	1	2.50%
Total	208	8	3.85%	3	1.44%

1/. The plaintiffs had not tested 69 Myrtle Street. The defendant's statistics however grouped this building with 73 and 79 Myrtle Street and 98 Garden Street. The buildings are adjacent, they have a common owner, a common superintendent and a common property manager. The testimony indicated that of the four buildings, 98 Garden Street was by far the largest building. It indicated that 98 Garden Street was a large building and that the Myrtle Street apartments were all appreciably smaller.

It was the Plaintiff's position that this statistical evidence constituted a prima facia case of racial discrimination United States v. Real Estate Development Corporation 347 F.Supp. 776 (N.D.Miss. 1972). As the Court said in United States v. Reddoch P.H.E.O.H. Rptr. Para 13569 (S.D. Ala.1972), aff'd per curiam 467 F.2nd 896 (5th Cir.1972), another apartment discrimination case,

> "In cases of racial discrimination, statistics often tell much and Courts listen." State of Alabama v. United States 304 F.2nd 583 (5th Cir. 1962), aff'd, 371 U.S. 37 1962. "Nothing is as emphatic as zero." United States v. Hinds County Board of Education 417 F.2nd 852 at 858 (5 Cir. 1969).

Similarly, the plaintiff maintained that evidence of the experience of white and black "testers" or "checkers" has uniformly entered into evidence to show the existence of discriminatory practices. Evers v. Dwyer 358 U.S.202 (1958)(buses); Pierson v. Ray 386 U.S.547 (1967) (bus terminals); Newbern v. Lake Lorelei, Inc. 308 F.Supp. 407 (S.D. Ohio, 1968)(housing); Harris v. Jones, 296 F. Supp. 1083 (D.Mass. 1969) (housing); Brown v. Ballas, 331 F.Supp. 1033 (N.D. Tex.1971) (housing); Williamson v. Hampton Management Co., 339 F.Supp.1146 (N.D.Ill.1972) (housing).

Finally, it was the Plaintiff's legal position that principals who provided an atmosphere in which agents might and did, easily and without supervision, make housing unavailable because of race, engaged in a pattern or practice of discrimination even though no specific instructions were given to agents to do so and even though

management gives perfunctory instruction to "treat everyone alike" without any effective effort to make sure the instructions are carried out. United States v. Youritan Construction Company, 370 F.Supp. 643 (N.D.Calif.1973). The words "pattern and practice" are not terms of art but have their generic meaning. In order to prove a pattern and practice it is necessary to show that a discriminatory act was not an isolated, accidental or peculiar departure from a nondiscriminatory norm. The number of blacks rejected is not determinative of the presence of such a pattern or practice. United States v. Ramsey 331 F.2nd 824 (5th Cir.1964).

The plaintiffs therefore sought damages despite the fact that they have not incurred any out-of-pocket expenses. Title VIII specifically authorizes punitive damages in the amount of $1,000. Similarly, 42 U.S.C.§1982 does not limit the amount of punitive damages that may be awarded. They understood that the award, if any, was in the Court's discretion. However, they believed that in order to fashion an effective remedy in this case of racial discrimination, the Court would award punitive damages and attorneys fees. Lee v. Southern Homesites, 429 F.2nd 290 (5th Cir. 1970). In that regard the plaintiffs attached a motion for, and affidavits in support of their claim for, reasonable attorneys fees to their brief.

In it's decision, the trial court found that racially discriminatory rental practices existed at 166 and 176 Collins Street, the buildings where Ms. Fort sought to be shown an apartment and the buildings in which Mr. Bookwalter resided. In addition, the Court specifically found such practices to exist at 73 Myrtle Street, 79 Myrtle Street and 98 Garden Street and not to exist at 7 Woodland Street. Finally the Court made no specific finding in that regard with regard to the office of the Defendant R.C. White. Based upon those conclusions, the Court awarded the Plaintiffs Luddie Fort and James Bookwalter nominal damages in the amount of $1.00 each. It did not award any punitive damages and it denied the Plaintiff's motion for reasonable attorneys fees. It is from this decision that the Plaintiffs have appealed claiming that the Court erred in denying them adequate compensatory damages, punitive damages, and reasonable attorneys fees.

STATEMENT OF FACTS

The Plaintiff accepts the factual determinations made by the trial court in it's Memorandum of Decision as amended.[1] The only portions of the court decision which the plaintiffs questioned on appeal are the Court's denial of adequate compensatory damages, punitive damages and attorneys fees.

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[1] In the Memorandum of Decision, the Court had indicated that the black tester at 7 Woodland Street who had been shown an apartment but who had then been falsely informed by an office employee of the defendant's that there was a "hold" on that apartment, had not experienced an act of racial discrimination. The Court concluded that at most the evidence indicated that the tester's personality conflicted with some of the employees and tenants. In coming to that result, the court indicated that there had been evidence introduced concerning 7 Woodland Street which was consistent with the conclusion that the black tester, Kathleen Malcolm, had not experienced an act of racial discrimination. In that regard, the court pointed to an alleged fact that two other black testers, Adrienne Dukes and Chester Smith testified that they had been referred over the telephone by the defendants office to 7 Woodland Street. Prior to the expiration of 10 days from the entry of judgment, the plaintiff moved to amend the decision by deleting that portion of the Memorandum of Decision. The court granted the Plaintiffs motion since neither black tester had so testified.

ARGUMENT

I.

The Court erred in not awarding attorneys fees.

The Plaintiffs' sought attorneys fees pursuant to Title 42 U.S.C.§3612 (c) and pursuant to Title 42 U.S.C.§1982. The Court, while finding for the Plaintiff, denied attorneys fees under both statutes.

Given its rationale, the Plaintiffs' claim for attorneys fees under Title 42 U.S.C. §1982 would now be barred by virtue of Alyeska Pipeline Service Company v. Wilderness Society 43 L.W.4561 (May 12, 1975). The Plaintiffs had sought attorneys fees under that statute by virtue of their role as private attorneys general. After Alyeska, that theory cannot be used to support a claim for attorneys fees in the absence of express statutory authorization for counsel fees. The District Court, however, did not deny counsel fees on that ground. Instead it concluded that the Plaintiffs did not in fact act as private attorneys general.

While, because of Alyeska, the Plaintiffs can no longer claim attorneys fees under Title 42 U.S.C.§1982 as private attorneys general, they want to discuss the trial court's denial of counsel fees under that statute because they believe that to ignore the incorrect conclusions of that court could easily lead this court to a misapprehension of the facts.

The District Court found that the Plaintiffs were not private attorney generals because they had abandoned their claims for declaratory and injunctive relief. They did so however in an expressed exchange for the defendant's agreement to sign the consent decree which was then filed. That consent decree enjoined the defendant from discriminating. It required the defendant to conduct an educational program for his employees. Moreover it required him to adopt and implement an affirmative action housing plan. That affirmative action plan included, among its other more standard provisions relating to advertising and employment, a requirement that, in buildings where more than 85% of the tenants were white, the defendant keep vacant apartments available until they were shown to at least two bona fide minority apartment seekers or until ten days had elapsed whichever event occurred first. During that period, several area minority organizations, including the Urban League, were, by virtue of the decree, to be notified of the existing vacancies. Despite the wide ranging provision of this consent decree, the court concluded that the Plaintiffs had not functioned as private attorneys general. Instead the Court said that the United States had obtained the consent decree before the action went to trial.

The United States action, which also alleged that the Defendant engaged in a pattern and practice of racial discrimination was filed and joined with the Plaintiffs' case on the day that the Plaintiff's case went to trial. From an examination of the decree, the Court could have been aware that it was entered in both cases, that it referred to both cases, that it contained the caption of both cases, and that it was signed by both the individual and governmental Plaintiffs. Moreover the Court could have been aware from the affidavit accompanying the Plaintiffs' main brief and their motion for counsel fees that Plaintiffs' counsel was claiming to have expended more than twenty-five hours in negotiating that consent decree.

In fact, the Plaintiff had played an integral part in obtaining the consent decree and in bringing the Defendant's action to the government's attention. This was expressly brought to the Court's attention through the letter from the Justice Department attached to an affidavit from Plaintiff's counsel which was filed with the Plaintiff's unsuccessful motion to reconsider the denial of counsel fees and punitive damage. That letter discussed the Court's apparent misunderstanding of the private Plaintiffs' role and described their active participation in the negotiation of the consent decree.

As a result of the Alyeska decision, the Plaintiffs cannot recover counsel fees for their services as private attorney generals under the Civil Rights Act of 1871. They can however recover such

fees under Title 42 U.S.C.§3612 which contains an express statutory authorization for awarding counsel fees. It also provides however that the counsel fees will be awarded only where the plaintiffs are not able to assume the costs of counsel fees. The District Court in denying counsel fees under this statute assumed arguendo that the Defendant was in a better position to bear the expense of the Plaintiffs' counsel. In fact, the Court had an affidavit from the Plaintiff Luddie Fort indicating that she was a student without sufficient funds to have brought suit had she been required to pay for the services of an attorney. It also had the affidavit of the Plaintiff James Bookwalter that this interest in terminating the racially discriminatory practices in the rental of apartments in the building in which he resided would not have caused him to bring this action if he had had to hire an attorney from his own funds.

The Courts denial of counsel fees under Title 42 §3612(c) was unrelated to the Plaintiffs ability or inability to assume that burden. The counsel fees were denied because the Plaintiffs had not proved the Defendant's direct involvement in the discriminatory actions of his employees and because the Court found the rule announced by the Supreme Court in Newman v. Piggee Park Enterprises 390 U.S.400 (1968) and Northcross v. Board of Education 412 U.S.427 (1973) to be inapplicable to fair housing cases. In Newman, a case brought under Title II of the Civil Rights Act and

in Northcross, a case brought under Section 718 of the Emergency School Act, the Supreme Court ruled that successful plaintiffs under those acts which provided for the possible award of attorneys fees, should ordinarily recover such attorneys fees in the absence of special circumstances. The Court so ruled because it found that if successful plaintiffs were routinely forced to bear their own attorneys fees, few aggrieved parties would be in a position to advance the public interest expressed in those statutes. It found, therefore, that the congressional intent had been to create a presumption in favor of attorneys fees whenever the plaintiffs prevailed under Title II of the Civil Rights Act or Section 718 of the Emergency School Act.

In the instant case the court found no comparable presumption to exist in fair housing cases. This conclusion of the District Court is at variance with the two other reported cases in which the same issue has been considered. In both Jeantry v. McKey and Pogue, Inc. 496 F.2d 1119 (Cir.1974) and Stevens v. Dobs, Inc. 373 F.Supp.618 (E.D.N.C.1974), those courts found the Newman-Northcross presumptive rule with regard to attorneys fees to be applicable to fair housing cases. In Stevens, the District Court said

> "This Court is of the opinion that public policy demands that counsel fees be awarded in housing discrimination cases so that prejudiced individuals will not be hesitant in enforcing their rights." at 620, 621.

In Jeanty the circuit court not only reversed the district courts award of $400 attorneys fees as inadequate, it also awarded $1000 in counsel fees upon appeal. In so doing, that court said that the general policy announced by the Supreme Court in the Newman

> "is equally applicable to a Title VIII action..."

It is the plaintiffs' position that the district court erred in not adopting the rationale of the Jeanty and Stevens cases and that the matter should either be remanded for a determination of attorneys fees or that this court should award attorneys fees based on the affidavits and motion contained in the record. Moreover, as in Jeanty, the plaintiffs believe that attorneys fees for the appeal should also be awarded and as in Jeanty they so specifically request.

In lieu of adopting a presumptive rule in favor of attorneys fees the District Court elected to adopt the balancing of the equities test in order to determine whether to award attorneys fees to the successful plaintiffs in this fair housing case. In conducting that test the Court concluded that attorneys fees should not be awarded. It reached this result because it found an overriding equity against the award of attorneys fees. The Court concluded that, since the defendants liability was based entirely upon what it found to be unauthorized actions of his employees attributed

to the defendant by the doctrine of respondeat superior, that it would be unjust to punish the defendant by awarding the Plaintiffs attorneys fees.

The Plaintiffs do not believe that the use of a balancing test is the appropriate method for determining whether to award attorneys fees to successful plaintiffs in fair housing cases. However even if this court should find that the District Court's interpretation of the law was correct the plaintiffs contend that the court erred in its application of the balancing of the equities test. Specifically, the District Court did not consider, in determining whether or not to award attorneys fees to successful plaintiffs under Title 42 U.S.C.§3612, whether they had acted as private attorneys general. It failed to consider this factor because when it decided that the plaintiffs were not entitled to attorneys fees under Title 42 U.S.C.§1982, it had incorrectly concluded that the plaintiffs were not acting as private attorneys general. Therefore the court did not give any weight to the plaintiffs successful efforts to obtain the meaningful consent decree entered in this case when it considered the issue of whether or not to award them attorneys fees under Title 42 U.S.C.§3612.

With regard to the issue of attorneys fees, it is the plaintiffs position that the district court erred (1) in failing to find the Newman-Northcross rule applicable to fair housing cases and/or (2) in the manner in which it applied the balancing of the equitites test.

II

The Court erred in awarding nominal damages of $1.00 to each plaintiff and not awarding punitive damages.

The Plaintiffs sought compensatory damages and punitive damages. The Court awarded them $1.00 each as nominal damages and denied punitive damages. The plaintiffs had incurred no out-of-pocket expenses. They were seeking damages and punitive damages as compensation for adignatory tort. The court, however, concluded that they were not entitled to compensatory damages. In discussing this issue the trial court first stated that Plaintiffs' counsel had represented in open court that compensatory damages were not being sought. However it is clear from footnote 2 of the opinion, that the court understood that representation to mean no more than that the plaintiffs sought monetary relief only on a punitive theory. The plaintiffs' complaint and the consent decree made it clear that the plaintiffs were seeking damages and the Court specifically found that the defendant was not prejudiced by its claimed interpretation of plaintiffs' counsel's remarks. The Court, however, after considering the issue, then denied the plaintiffs compensatory damages because he concluded that they did not attempt to show actual damages to themselves. The court had found that the Plaintiff Fort was not shown an available apartment

in the building in which the plaintiff Bookwalter lived solely because of her race. The Court concluded however that these findings were not sufficient, in themselves, to warrant an award of compensatory damages. Apparently, such damages were denied by the Court because the plaintiffs did not offer evidence that they had suffered mental anguish and humiliation. It is the plaintiffs claim that, in order to recover for a dignatory tort, they were not obligated to prove out-of-pocket expenses or humiliation and that the court therefore erred in denying them compensatory damages upon the facts which the court found.

The Court also denied punitive damages. It did so because it concluded (1) that the plaintiff did not prove that the defendant's actions were willful and (2) that the deterrent effect that an award of punitive damages normally had was not needed in this case because the consent decree would guarantee that the defendant would in the future act in a nondiscriminatory fashion or be subject to a citation for contempt of court.

The Court had concluded that superintendents employed by the defendant were discriminating in a willful and wanton manner and that the defendant's office help might have been able to discover this, particularly because the occupancy statistics strongly warned of discrimination. However the Court ruled that the defendant could not be liable in punitive damages merely for the willful,wanton careless and/or insensitive actions of his employees.

There is no other case which discusses whether a defendant can be liable in punitive damages under Title 42 U.S.C.§3612 for the acts of his employees. It is, to the best of the plaintiffs knowledge, in that regard, a case of first impression. In United States v. Youritan Construction Company 370 F. Supp.643 (N.D.Calif. 1973), a District Court judge found that defendants who provided an atmosphere in which employees easily might and did discriminate were liable for the actions of their employees. Damages were not at issue in that case. In this case, the court has found a pattern and practice of racial discrimination to have been practiced by field employees of the defendant in buildings managed by the defendant. Moreover it is found that black testers who went to the defendant's office were not informed with regard to vacancies in those buildings while white testers were so informed. Aside from proving the defendant to have been an active participant in the discriminatory acts, there was nothing else that these plaintiffs could have shown to justify punitive damages based upon the employees' actions. If these plaintiffs, therefore, are not entitled to punitive damages, then it will be a near impossibility to hold the principles of any large company liable in punitive damages for the actions of their subordinates.

In order to award nominal damages, the District Court had to and did find the defendant liable for the actions of his employees. The plaintiffs contend that the Court erred in not finding the defendant liable in punitive damages for his employees actions for which he was responsible.

Moreover the plaintiffs contend that the court erred in ignoring the general deterrent effect of punitive damages in this case. The court ruled that no deterrent effect was needed in this case because the defendant would be deterred from acts of future discriminatory conduct due to the existence of the consent decree negotiated by the plaintiffs and filed in this case. In reaching its conclusion, the Court ignored the general deterrent effect that an award of punitive damages would have in deterring other members of society from engaging in similar conduct.

The plaintiffs believe that the court's denial of more than $1.00 nominal damages and of punitive damages should be reversed and that the case should be remanded with instructions that the District Court enter a judgment in the plaintiffs' favor of compensatory damages in excess of $1.00 and of punitive damages.

CONCLUSION

In Traficante v. Metropolitan Life Insurance Company 409 U.S.205 (1972), the Supreme Court, in order to give vitality to the fair housing laws, gave a broad interpretation to the standing provisions of Title VIII. The Court noted...

> "most of the fair housing litigation conducted by the attorney general is handled by the Housing Section of the Civil Rights Division, which has less than two dozen lawyers. Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits in which, the Solicitor General says, the complainants act not only in their own behalf but also 'as private attorneys general in vindicating a policy that Congress considers to be of the highest priority.' The role of 'private attorneys general' is not uncommon in modern legislative programs...It serves an important role in this part of the Civil Rights Act of 1968 in protecting not only those against whom a discrimination is directed but also those whose complaint is that the manner of managing a housing project affects 'the very quality of their daily lives'."

The plaintiffs fail to see how that important role can be said to be encouraged by the decision in this case. They have proven that the acts of discrimination practiced against them were a part of a pattern and practice of racial discrimination for which the defendant was responsible. The court, however, has awarded them each only $1.00 and has denied them meaningful compensatory damages, punitive damages and attorneys fees. Because the plaintiffs believe that others should be encouraged

to utilize the provisions of Title VIII in order to obtain judicial scrutiny of racially discriminatory housing practices and because they believe that the decision in this case will discourage such activity, they have appealed to this court for a review of the trial judge's decision to deny meaningful damages and attorneys fees.

RESPECTFULLY SUBMITTED

Plaintiff

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Luddie Fort
James Bookwalter
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Robert C. White d/b/a
Robert C. White Co., Realtors
Defendant/Appellee — September 15, 1975

CERTIFICATE OF SERVICE

This is to certify that the Appellants have, on the 15th day of September 1975, mailed two copies of Appellants Brief postage prepaid, first class, to the following attorneys: Arnold E. Buchman, Esquire, 101 Pearl Street, Hartford, Conn. and James Callahan, 60 Washington Street, Hartford, Conn.

Bruce Mayor
Counsel for the Appellants

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